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Hospital Lien for Medical Services Not Required to Pay Share of Attorneys' Fees for Recovery Out of Personal Injury Claim

The Supreme Court of Colorado upheld a lower court's summary judgment holding that a hospital seeking to enforce a statutory lien for payment of medical services upon the proceeds of a personal injury settlement was not required to pay any attorneys' fees incurred in obtaining that recovery.[1]

Plaintiff sustained a "slip and fall" injury in his apartment, and subsequently entered defendant hospital for treatment.[2] Upon admission, plaintiff agreed to pay all costs of his medical care including any attorneys' fees resulting from collection efforts.[3] Plaintiff incurred costs of $13,703.97.[4] Plaintiff then pursued a tort claim against the owner of the apartment complex.[5] The hospital assigned plaintiff's bill to HHL Financial Services (HHL) for collection; and HHL filed a lien on behalf of the hospital for $13,703.97 against any amount plaintiff might recover from his lawsuit.[6]

The landlord's liability insurer settled plaintiff's claim by issuing two checks totaling $80,000.[7] A check in the amount of $13,703.97 was issued jointly to plaintiff, his attorney, and HHL.[8] Plaintiff sought to reduce the hospital lien by a proportionate share of attorneys' fees to $4,562.16; however, HHL demanded full payment.[9] The remaining balance was issued to plaintiff and his attorney.[10] Plaintiff sued seeking a declaratory judgment regarding the rights of the parties regarding the $13,703.97 check.[11] Defendant hospital was granted summary judgment.[12] The court ordered plaintiff to pay the lien plus interest, as well as each defendants attorneys' fees.[13]

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[1]Trevino v. HHL Fin. Servs., 945 P.2d 1345, 1346 (Colo. 1997).
[2]*Id.* at 1347.
[3]*Id.*
[4]*Id.*
[5]*Id.*
[6]*Trevino,* 945 P.2d at 1346.
[7]*Id.*
[8]*Id.*
[9]*Id.*
[10]*Id.*
[11]*Trevino,* 945 P.2d at 1346.
[12]*Id.* at 1347.
[13]*Id.*

Plaintiff appealed, arguing the common fund doctrine required defendants to pay a portion of the attorneys fees incurred in obtaining the settlement.[14] The court held the common fund doctrine was inapplicable to hospital liens, because the hospital was the creditor, and had no rights of subrogation against the initial tortfeasor.[15] Accordingly, the court upheld the judgment requiring plaintiff to pay the full lien.[16] *Trevino v. HHL Fin. Servs., 945 P.2d 1345 (Colo. 1997).*

CRIME

Civil Forfeiture and Loss of Not Bases for Decreased Prison Sentence of Physician

The United States Court of Appeals for the Eleventh Circuit vacated the reduced sentence of the lower court and remanded for re-sentencing, holding the lower court abused its discretion by imposing a sentence lower than sentencing guidelines.[17]

Defendant physician pled guilty to conspiring to dispense controlled substances and to witness tampering.[18] A lower court imposed a sentence of seventy months imprisonment, less than the 108 to 135 months indicated by sentencing guidelines.[19] The lower court justified its downward departure based upon defendant's loss of professional privileges and defendant's return of $50,000 of the proceeds of his illegal activity as part of his plea agreement.[20]

The issue presented on review was whether the lower court had abused its discretion in departing from the sentencing guidelines.[21] The court held a party's failure to object to the imposition of a sentence did not constitute a waiver.[22] The court stated a departure from sentencing guidelines required determination of what factors made the case atypical, and then, whether those factors were sufficient to result in a different

[14] *Id.*
[15] *Id.* at 1350.
[16] *Trevino*, 945 P.2d at 1351.
[17] United States v. Hoffer, 129 F.3d 1196, 1205 (11th Cir. 1997).
[18] *Id.* at 1197.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Hoffer*, 129 F.3d at 1200.

sentence.[23] The court held a plea agreement not to contest a civil forfeiture was only relevant to possible monetary sanctions, but had no bearing on the term of incarceration.[24] Moreover, such an agreement was not a basis for imposing a more lenient sentence than allowed by the sentencing guidelines.[25] Additionally, the court held the loss of professional privileges was not a valid basis for departure from the sentencing guidelines.[26] Therefore, the court vacated defendant's sentence, and remandated the case for re-sentencing.[27] *United States v. Hoffer, 129 F.3d 1196 (11th Cir. 1997).*

DISABILITY

Corporate Downsizing Legitimate Reason for Releasing HIV-Positive Plaintiff from Employment

The United States Court of Appeals for the Sixth Circuit affirmed summary judgment in favor of defendant employer in an employment discrimination action brought under Title I of the Americans with Disabilities Act (ADA).[28]

Defendant employed plaintiff for approximately three years before plaintiff's immediate supervisor notified plaintiff of his termination.[29] Plaintiff was diagnosed human immunodeficiency virus (HIV) positive in 1984, and developed acquired immune deficiency syndrome (AIDS) in 1990.[30] Plaintiff submitted health care claims exceeding $225,000 to the company's medical provider.[31] Plaintiff argued his health condition and high medical costs were the true reasons for termination of his employment.[32] Defendant claimed plaintiff's discharge was the result of a company plan to downsize supervisory positions.[33]

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[23]*Id.* at 1200.
[24]*Id.*
[25]*Id.* at 1203.
[26]*Id.* at 1205.
[27]*Hoffer*, 129 F.3d at 1205.
[37]Wohler v. Toledo Stamping & Mfg. Co., 125 F.3d 856, 856 (6th Cir. 1997).
[29]*Id.*
[30]*Id.*
[31]*Id.*
[32]*Id.*
[33]*Wohler*, 125 F.3d at 856.

The court first addressed plaintiff's claim of discriminatory discharge.[34] The court stated to establish a *prima facie* case of discriminatory discharge under the ADA, plaintiff was required to show:

(1) he was an individual with a disability within the meaning of the ADA;

(2) he was qualified to perform the essential functions of his job with or without reasonable accommodation; and

(3) he had suffered an adverse employment decision because of his disability.[35]

The court found plaintiff satisfied the first two elements of the three-pronged test.[36]

Regarding the third prong, the court held plaintiff failed to carry his burden of establishing a discriminatory motive by defendant.[37] The court stated plaintiff was required to produce sufficient evidence to allow a reasonable jury to reject defendant's articulated explanation for the discharge as a mere pretext for illegal discrimination.[38] The court explained if plaintiff had established a prima facie case of discrimination, the burden of production would have shifted back to defendant to prove non-discriminatory motives.[39] Following defendant's explanation of down-sizing, the burden shifted back to plaintiff.[40] Although plaintiff provided some evidence that defendant was not planning a full-scale "reduction-in-force," he failed to provide sufficient evidence for a jury to conclude decreasing the number of supervisory positions was not the reason for his discharge.[41]

Finally, the court addressed plaintiff's claim that defendant failed to provide reasonable accommodation.[42] Initially, plaintiff could have had

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[34] *Id.* at 857.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 4.
[38] *Wohler*, 125 F.3d at 859.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 861.

a right to reasonable accommodation, if he had been discharged because of his disability.[43] However, plaintiff failed to establish that he was discharged because of his disability and presented no evidence of any needed accommodation based on his disability.[44] Accordingly, the court affirmed the district court's grant of summary judgment in favor of defendant.[45] *Wohler v. Toledo Stamping & Mfg. Co., 125 F.3d 856 (6th Cir. 1997).*

DISCOVERY

Claim of Mental Anguish Does Not Automatically Compel Disclosure of Medical Records

The United States District Court for the Eastern District of Texas, in a claim based on mental anguish, held defendants could compel disclosure of plaintiff's full medical histories only if plaintiffs placed their mental condition at issue.[46]

Plaintiffs, employees of defendant petroleum company, filed a claim against defendant alleging discrimination based on sex and race.[47] Defendant, in response, filed a motion to compel plaintiffs to allow defendant to evaluate plaintiffs' medical histories, in the event plaintiffs sought damages for mental anguish.[48] However, plaintiffs alleged their mental conditions were not part of the case; and, thus, defendant should be denied access to plaintiffs' medical records.[49]

The court considered whether a plaintiff's mental condition was "in controversy" in a title VII case.[50] The court held "[s]ince the Fifth Circuit does not require medical testimony or medical records to support a claim for mental anguish in Title VII or 1981 cases, it is clear that the Fifth Circuit interprets 1981 and Title VII such that a claim for mental anguish or emotional harm under those theories does not necessarily put the

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[43]*Wohler*, 125 F.3d at 861.
[44]*Id.*
[45]*Id.*
[46]Burrell v. Crown Cent. Petroleum, 177 F.R.D. 376 (E.D. Tex. 1997).
[47]*Id.* at 378. *See* 42 U.S.C.A. § 2000e; 42 U.S.C.A. § 1981.
[48]*Id.* at 379.
[49]*Id.*
[50]*Id.*

plaintiffs mental condition in controversy."[51] In addition, the court held the medical records were not relevant to prove mental anguish, and thus denied defendants motion to compel.[52]

Finally, the court granted defendant's motion to compel computations for work related damages, but denied the motion for computation of compensatory damages based on mental anguish.[53] *Burrell v. Crown Cent. Petroleum, 177 F.R.D. 376 (E.D. Tex. 1997).*

EMPLOYMENT PRACTICES

Employee Did Not Forfeit FMLA Rights by Failing to Return to Work on Day After His Father's Death

The United States District Court for the Northern District of Illinois, Eastern Division, denied defendant employer's motion for summary judgment, holding plaintiff employee did not forfeit rights under the Family and Medical Leave Act (Act) when he failed to return to work on the day after his father's death.[54]

Plaintiff requested leave under the Act to care for his father, who had been diagnosed with cancer.[55] Plaintiff's third request was granted for a five-week leave of absence.[56] After returning to work two weeks after his father's death, plaintiff was demoted and eventually forced to resign.[57] Plaintiff filed suit alleging violation of the Act.[58]

The main issue the court addressed in responding to defendant's motion for summary judgment was whether plaintiff forfeited his rights under the Act.[59] Defendant argued plaintiff's leave of absence expired on the day his father died, and plaintiff abandoned his rights under the Act by not returning to work the next day.[60] The court held because defendant had not informed plaintiff in writing of his rights and obligations under

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[51]*Burrell,* 177 F.R.D. at 381.
[52]*Id.*
[53]*Id.* at 387.
[54]Sherry v. Protection, 981 F. Supp. 1134, 1133 (N.D. Ill. 1997).
[55]*Id.*
[56]*Id.*
[57]*Id.*
[58]*Id.*
[59]*Sherry,* 981 F. Supp. at 1134.
[78]*Id.* at 1135.

the Act, defendant could not rely on provisions of the Act to penalize plaintiff.[61] Additionally, the court denied defendant's argument the Act was not violated; because plaintiff was eventually granted five weeks of leave.[62] The court explained that defendant's argument was erroneously premised on the idea the Act could only be violated through a denial of a valid request for leave of absence.[63] The court held any interference by the employer with any right provided for in the Act constituted a violation of the Act.[64] Accordingly, the court denied defendant's motion for summary judgment.[65] *Sherry v. Protection, Inc., 981 F. Supp. 1133 (N.D. Ill. 1997).*

EMTALA

EMTALA Does Not Authorize Private Action Against Physicians

The United States District Court for the Eastern District of New York granted defendant physician's motion for summary judgment against complaint alleging causes of action under the Emergency Medical Treatment and Active Labor Act (EMTALA).[66] The court retained supplemental jurisdiction over plaintiff regarding the state law medical malpractice claim.[67]

Plaintiff, a six year-old boy, was injured in a snowball fight.[68] Two days later defendant physician examined plaintiff, but diagnosed only a viral illness.[69] Three days after the initial visit, plaintiff returned to the emergency room with continuing fever.[70] Defendants diagnosed appendicitis, but found a normal appendix at surgery.[71] Five days after the

[61] *Id.* at 1136.
[62] *Id.* at 1137.
[63] *Id.*
[64] *Sherry,* 981 F. Supp. at 1147.
[65] *Id.* at 1134.
[343] Fisher v. N.Y. Health & Hosp. Corp., 989 F. Supp. 444, 446 (E.D.N.Y. 1998).
[67] *Id.* at 450.
[68] *Id.* at 446.
[69] *Id.*
[70] *Id.*
[71] *Fisher,* 989 F. Supp. at 446.

appendectomy, defendant diagnosed a severe brain abscess.[72] In addition to the brain abscess, plaintiff was diagnosed with bilateral subdural empyemas and an epidural hematoma.[73] As a result of the subsequent brain surgery, plaintiff lost part of his skull, which required him to wear a hard hat for protection.[74] Plaintiff also suffered from neurological, motor, behavioral, and emotional damage as a result of the illness and surgery.[75]

Plaintiff claimed under EMTALA defendant failed adequately to screen plaintiff when he arrived in the emergency room and failed to stabilize him before discharging him.[76] In reaching its decision, the court noted the rationale behind the passage of EMTALA was in response to the growing concern hospitals were dumping patients unable to pay, either by refusing to provide emergency medical treatment, or transferring patients before their medical conditions were stable.[77] The court stated the language of EMTALA virtually precluded the implication of a private right of action against individual physicians.[78] Congress, the court noted, chose to provide a private right of action only against hospitals, although authorizing the Secretary of Health and Human Services to proceed administratively against both hospitals and physicians.[79] Accordingly, the court granted a motion for summary judgment in favor of defendant physician.[80] *Fisher v. N.Y. Health & Hosp. Corp., 989 F. Supp. 444 (E.D.N.Y. 1998).*

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[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Fisher,* 989 F. Supp. at 446.
[77] *Id.* at 447.
[78] *Id.* at 448.
[79] *Id.*
[80] *Fisher,* 989 F. Supp. at 450.

EVIDENCE

Child Victim's Statement Identifying Sexual Abuser was Admissible Hearsay Under Medical Treatment Exception

The Supreme Court of Mississippi affirmed a lower court's conviction of sexual battery.[81] The court held a child victim's statement identifying the perpetrator to his family medical practitioner was admissible hearsay under the medical treatment exception, regardless of whether the perpetrator was a member of the child's immediate household.[82] Additionally, the court upheld the trial court's finding that the child was unavailable as a witness for refusing to testify, and that the child's statements to his physician, mother, and social worker were sufficiently reliable to be admissible hearsay.[83]

The child victim claimed he was sexually battered by defendant and told his mother, social worker, and family physician details of the battery.[84] The social worker spoke with defendant about the incident.[85] At trial, the victim refused to testify, and was found unavailable as a witness.[86] Defendant was subsequently convicted of sexual battery.[87]

The first issue on appeal was whether defendant's actions constituted sexual battery, because defendant did not penetrate the victim.[88] The court held the issue of penetration was not an element of the crime.[89] The second issue was whether defendant's statements to the social worker should have been excluded, because the social worker did not inform defendant of his Miranda rights.[90] The court held the social worker was not a law enforcement officer capable of arresting defendant, and defendant was not in custody at the time of the interview.[91] Therefore, the

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[81]Hennington v. Mississippi, 702 So. 2d 403, 406 (Miss. 1997).
[82]*Id.* at 414-15.
[83]*Id.* at 412, 417-18.
[84]*Id.*
[85]*Id.* at 406.
[86]*Hennington*, 702 So. 2d at 406-07.
[87]*Id.*
[88]*Id.* at 407.
[89]*Id.* at 408.
[90]*Id.* at 409.
[91]*Hennington*, 702 So. 2d at 409.

social worker was not required to give defendant Miranda warnings.[92] Third, the court considered whether the lower court properly found the victim unavailable as a witness, because the victim refused to testify.[93] The court found the trial judge had not abused his discretion, because he made every effort to persuade the child to testify.[94]

The final issue was whether testimony by the mother, social worker, and physician was inadmissible hearsay. The physician's testimony, which included the victim's identification of defendant as the perpetrator, was admissible under the medical treatment hearsay exception.[95] The court held in child abuse cases, statements identifying the perpetrator were sufficient as medical treatment and, thus, reliable if the perpetrator had regular contact with the victim.[96] The court also found the testimony by the social worker and the victim's mother satisfied the two part test for reliability: (1) whether the child declarant's statements were made spontaneously or without suggestion, and (2) whether the child declarant was likely to be telling the truth when the statements were made.[97] The court found the statements were spontaneous and truthful, and thus were admissible hearsay.[98] *Hennington v. Mississippi, 702 So. 2d 403 (Miss. 1997).*

EXPERT WITNESS

Expert Allowed to State Three-week Delay in Diagnosing Breast Cancer Increased Risk of Harm

The Superior Court of Pennsylvania reversed the lower court's decision disallowing expert testimony in a negligence action and remanded the case for a new trial.[99]

Patient scheduled an appointment with defendant physician because of severe pain and physical changes in her breast.[100] Patient was seen by

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[92] *Id.*
[93] *Id.*
[94] *Id.* at 412.
[95] *Id.* at 415 (citing MISS. R. EVID. 803(4)).
[96] *Hennington*, 702 So. 2d at 415.
[97] *Id.* at 417-18.
[98] *Id.*
[0] Smith v. Grab, 705 A.2d 894, 896 (Pa. Super. Ct. 1997).
[100] *Id.* at 897.

defendant's physician assistant (P.A.) and was prescribed an antibiotic.[101] One week later, patient returned to defendant's office because her symptoms had not changed; and again she was seen by the P.A. who prescribed a stronger antibiotic.[102] Three weeks after patient's initial appointment, the patient returned to defendant and was again seen by the P.A.[103] Patient was given a mammography and a biopsy was scheduled.[104] Patient was then diagnosed with cancer, failed to respond to chemotherapy, and eventually died.[105]

Patient and her husband (plaintiff) commenced an action for negligence, misrepresentation, and punitive damages against defendant and P.A.[106] Plaintiff alleged the P.A. was negligent in failing to diagnose patient's cancer; and that the defendant physician acted with reckless disregard for patient's safety when he entrusted patient to the P.A. on all three occasions.[107] During discovery, plaintiff's expert cited no sources for his opinion that the three-week delay in diagnosis of cancer had a material effect on patient's likelihood of survival.[108] At trial, plaintiff's expert stated during cross-examination he based his opinions on general knowledge, rather than any specific material.[109] The trial court granted defendant's motion to strike plaintiff's expert testimony and granted a compulsory nonsuit.[110] Plaintiff appealed.[111]

The primary issues on appeal were: whether the court should have ordered a compulsory nonsuit and whether plaintiff's expert testimony should have been disallowed.[112] The court held plaintiff's expert testimony should not have been stricken, because the testimony distinctly conveyed that the three-week delay in diagnosis increased the risk of harm.[113] The court also held the trial court erred by not affording plaintiff

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[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Smith*, 705 A.2d at 897.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Smith*, 705 A.2d at 897-98.
[110] *Id.*
[111] *Id.*
[112] *Id.* at 898.
[113] *Id.* at 890.

the benefit of all favorable evidence and reasonable inferences.[114] Accordingly, the court remanded the case for a new trial.[115] *Smith v. Grab, 705 A.2d 894 (Pa. Super. Ct. 1997).*

Res Ipsa Loquitur Inapplicable in Malpractice Cases When Issues Not a Matter of Common Knowledge

The Court of Appeals of Tennessee held *res ipsa loquitur* was inapplicable in a medical malpractice action, because the issues involved were not within the knowledge of an average layperson; therefore, an expert witness was required.[116]

Plaintiff patient was admitted to the hospital with pneumonia, and subsequently transferred to an Intensive Care Unit (ICU), where she was intubated, and placed on an respirator.[117] While in the ICU the nursing staff was responsible for "turning, positioning and restraining her body and extremities."[118] When the respirator tube was removed, plaintiff complained of numbness in her right arm and clumsiness in her right hand.[119] Plaintiff and her husband subsequently sued the hospital for medical malpractice under the theory of *res ipsa loquitur.*[120]

The Court began its analysis by noting "*[r]es ipsa loquitur* is an evidentiary doctrine which raises an inference 'from the nature of the circumstances of the occurrence causing the injury, that if due care had been exercised by the person in charge of the instrumentality,' the injury would not have occurred."[121] The Supreme Court of Tennessee generally disallowed *res ipsa loquitur* in medical malpractice cases where the alleged wrong treatment would require a scientific exposition of the question by expert testimony.[122]

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[114]*Smith*, 705 A.2d at 890.

[115]*Id.*

[119]Seavers v. Methodist Med. Ctr. of Oak Ridge, No. 03A01-9705-CV-00191, 1997 WL 785681, at *1 (Tenn. Ct. App. Dec. 16, 1997).

[117]*Id.*

[118]*Id.*

[119]*Id.*

[120]*Id.*

[121]*Seavers,* 1997 WL 785681, at *2 (citing Johnson v. Ely, 30 Tenn. App. 294 (Tenn. Ct. App. 1947)).

[122]*Id.* (citing Poor Sisters of St. Francis v. Long, 190 Tenn. 434 (Tenn. 1950)).

In the instant case, the Court held *res ipsa loquitur* inapplicable because the action required the introduction of expert testimony.[123] Defendant argued the injury to plaintiff was the result of an unknown cause and would have occurred even without a deviation in the standard of care.[124] However, plaintiffs argued the injury was the result of prolonged pressure.[125] The court held *res ipsa loquitur* did not apply, because the resolution of those conflicting views required the introduction of expert testimony.[126] Accordingly, the trial court's order granting defendant hospital's summary judgment was upheld.[127] *Seavers v. Methodist Med. Ctr. of Oak Ridge, No. 03A01-9705-CV-00191, 1997 WL 785681 (Tenn. Ct. App. Dec. 16, 1997).*

Res Ipsa Loquitur Can Apply to Medical Malpractice

The Court of Appeals of Ohio for the Seventh Appellate District, Mahoning County, held expert testimony regarding standard of care was not required in an action for medical malpractice in which the negligent act was so apparent as to be within the comprehension of lay persons.[128]

Plaintiff patient underwent surgery for the extraction of impacted wisdom teeth.[129] During the surgery, defendant, an oral surgeon, decided against removing an impacted tooth on the right side of plaintiff's mouth, because of the difficulty encountered in extracting the other impacted teeth.[130] Post-operatively, plaintiff suffered pain in his gum from a tooth fragment left during the surgery. Subsequent removal of the fragment relieved the pain.[131]

Plaintiff filed a small claims medical malpractice complaint against defendant.[132] Plaintiff sought for reimbursement paid for all deductibles

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[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Seavers*, 1997 WL 785681, at *2.
[127] *Id.*
[128] Wean v. Fader, No. 95 C.A. 257, 1997 Ohio App. LEXIS 4306, at *3 (Ohio Ct. App. Sept. 15, 1997).
[129] *Id.* at *1.
[130] *Id.*
[131] *Id.* at *2.
[132] *Id.*

paid the and for costs of removal of the tooth fragment, as well as the future costs of extraction of the remaining impacted tooth.[133] At trial, plaintiff presented testimony and evidence supporting his expenditures for the surgery, the pain caused by the remaining impacted tooth, and the anticipated expense of extraction of the remaining impacted tooth.[134] At the conclusion of plaintiff's case in chief, defendant moved for directed judgment, which the court granted.[135]

Plaintiff appealed, arguing the trial court failed to consider the evidence of the tooth fragment left behind after surgery under the doctrine of *res ipsa loquitur*.[136] The appellate court agreed, holding an exception to the requirement of expert testimony concerning standard of care existed when the physician's lack of skill was so apparent as to fall within the comprehension of lay persons.[137] Finding the trial judge possessed the common knowledge and experience to understand that plaintiff's whole tooth should have been extracted, the court held the doctrine of *res ipsa loquitur* applied, and vacated the directed verdict.[138] *Wean v. Fader, No. 95 C.A. 257, 1997 LEXIS Ohio App. 4306 (Ohio Ct. App. Sept. 15, 1997).*

INFORMED CONSENT

Testimony of Expert Witness that Patient Actually Gave Oral Informed Consent was Reversible Error

The Appellate Court of Illinois for the Fifth District reversed and remanded a lower court's judgment in favor of defendant physician against plaintiff patient's negligence claim.[139] The court held the testimony of defendant's expert witness, stating plaintiff had given oral consent to a tubal ligation, was reversible error.[140] Therefore, plaintiff was not barred from pursuing punitive damages under a claim of battery.[141]

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[133] *Wean*, 1997 Ohio App. LEXIS 4306, at *3.
[134] *Id.*
[135] *Id.* at *3-4.
[136] *Id.* at *4.
[137] *Id.* at *5.
[138] *Wean*, 1997 LEXIS Ohio App. 4306, at *7.
[139] Grant v. Petroff, 684 N.E.2d 1020, 1021 (Ill. App. Ct. 1997).
[140] *Id.* at 1026-27.
[141] *Id.*

Plaintiff brought a medical malpractice claim against the defendant, alleging she had not given consent to a tubal ligation performed by defendant.[142] At trial, defendant called an expert witness who had not personally heard plaintiff's conversations with defendant prior to surgery.[143] The expert witness concluded, based on the evidence presented, plaintiff had orally consented to the procedure.[144] Therefore, the expert witness determined defendant comported with the applicable standard of care.[145] At trial, the jury found in favor of defendant.[146]

The primary issue on appeal was whether the expert testimony presented by defendant should have been excluded, because the testimony went beyond the witness area of expertise and irreparably influenced the jury.[147] The court held the expert witness could have explained defendant would have comported with the applicable standard of care, if plaintiff had orally consented to the procedure.[148] However, the expert witness could not testify plaintiff did in fact consent to the procedure.[149] The testimony constituted reversible error because the expert witness did not possess specific knowledge qualifying him to testify as to the patient's veracity, and thus, his testimony prejudiced the jury.[150]

The second issue was whether plaintiff was entitled to file a separate complaint of battery.[151] The court held the claim of battery was not a claim of "healing art malpractice," and therefore, plaintiff was not barred from seeking punitive damages in connection with the battery claim.[152] Accordingly, the court reversed the judgment of the lower court and remanded the case for a new trial.[153] *Grant v. Petroff, 684 N.E.2d 1020 (Ill. App. Ct. 1997).*

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[142]*Id.* at 1021.
[143]*Id.* at 1021-22.
[144]*Grant*, 684 N.E.2d at 1021-22.
[145]*Id.*
[146]*Id.* at 1024.
[147]*Id.*
[148]*Id.* at 1026.
[149]*Grant*, 684 N.E.2d at 1026.
[150]*Id.*
[151]*Id.*
[152]*Id.* at 1027.
[153]*Id.*

INSURANCE

Insurance Company Not Required to Indemnify Psychiatrist Who had Sexual Relations With Patient

The United States District Court for Massachusetts held an insurance company, under a policy's undue familiarity exclusion, did not have to indemnify a psychiatrist who had sexual relations with a patient.[154] In August 1995, plaintiff psychiatrist filed a Complaint for Declaratory Judgment in the New Hampshire Superior Court alleging the defendant insurance company was required to indemnify him in an underlying tort action filed by one of his patients.[155]

In 1991, plaintiff purchased professional liability insurance from the American Psychiatric Association.[156] The underlying tort action filed against the psychiatrist alleged he had a consensual sexual relationship with a patient from 1991 to 1993.[157] He had reported the incident, but his license to practice medicine was subsequently revoked.[158] Defendant represented the plaintiff in the above action, but refused to indemnify plaintiff because of the undue familiarity exclusion.[159] The policy explicitly stated: "[T]he Programs policies do not provide either coverage, nor, with the exception of the undue familiarity exclusion, ... a defense, ... for any claim or damages based in whole or in part on a claim of undue familiarity."[160] The policy defined undue familiarity as "any physical touching by a Participating Member of any person, or any other demonstrated intention or act for the purposes of sexual stimulation."[161]

The court noted the policy exclusion for undue familiarity anticipated problems with the "transference" phenomenon,[162] in which the patient reveals her innermost feelings to her psychiatrist.[163] Although essential for successful therapy, transference leaves the patient emotionally

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[154]Franklin v. Prof. Risk Management Serv., 987 F. Supp. 71, 72 (D. Mass. 1997).
[155]*Id.*
[156]*Id.*
[157]*Id.*
[158]*Id.* at 73.
[159]*Franklin*, 987 F. Supp. at 73.
[160]*Id.*
[161]*Id.*
[162]*Id.*
[163]*Id.*

vulnerable.[164] Plaintiff took advantage of transference to have sexual relations with his patient.[165] Accordingly, plaintiff's actions fell within the undue familiarity exclusion of the policy.[166] Finally, the court noted, the exclusion was prominently displayed in the policy, and plaintiff had notice defendant would not indemnify him in such situations.[167] Therefore, the court denied the declaratory judgment for plaintiff.[168] *Franklin v. Professional Risk Management Serv. 987 F. Supp. 71 (D. Mass. 1997).*

Misrepresentations Do Not Invalidate Temporary Insurance Policy

The United States Court of Appeals for the Fifth Circuit ordered defendant insurer to pay policy proceeds to beneficiaries under the terms of a temporary insurance agreement.[169]

Plaintiffs sued defendant life insurance company after defendant refused to pay benefits under the terms of a temporary insurance policy.[170] Defendant based its claim upon allegations of misrepresentations on decedent's policy application.[171] On the application, decedent failed to disclose he had received treatment for the use of alcohol and depression within the past three years.[172] After decedent's death, plaintiffs filed a claim form, in which they indicated decedent had been undergoing treatment for depression and chronic pain.[173] Defendant denied liability as a result of this discrepancy.[174] Plaintiffs argued defendant could not rely on the misrepresentations, because defendant failed to attach a copy of decedent's application to the temporary insurance agreement as required by Texas law.[175]

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[164]*Franklin*, 987 F. Supp. at 73.
[165]*Id.* at 74.
[166]*Id.* at 75.
[167]*Id.* at 76.
[168]*Id.* at 77.
[169]Riner v. Allstate Life Ins. Co., 131 F.3d 530, 540 (5th Cir. 1997).
[170]*Id.* at 532.
[171]*Id.*
[172]*Id.*
[173]*Id.*
[174]*Riner*, 131 F.3d at 532.
[175]*Id.* at 533.

The court concluded defendant was obligated to pay the proceeds of decedent's policy.[176] The court determined the plain language of the policy indicated intent by defendant to provide temporary coverage during the period decedent's application was pending.[177] The terms of the policy required the insurer to provide temporary coverage after the decedent completed his medical exam.[178] The court further held the decedent's policy was never conditionally terminated during the period of temporary coverage.[179]

The court also concluded under Texas law, a provision making truthful answers on insurance policy applications a condition precedent to temporary life insurance coverage could not be upheld.[180] Moreover, the statute precluded an insurer from relying upon representations in a life insurance application unless a copy of the application was attached to, and made part of, the contract or policy of insurance.[181] Accordingly, the court reversed summary judgment in favor of the defendant and ordered payment of benefits.[182] *Riner v. Allstate Life Ins., 131 F.3d 530 (5th Cir. 1997).*

MEDICAL MALPRACTICE

Failure to Attach Medical Records to Plaintiff's Affidavit Fatal Defect

The Court of Appeals of Texas, Dallas division, affirmed a trial court's grant of summary judgment in favor of defendant physician because plaintiff patient's affidavits failed to comply with Rule 166a(f) of the *Texas Rules of Civil Procedure.*[183] Medical records referred to in the affidavits were neither attached, nor served with the affidavits.[184]

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[176]*Id.* at 540.
[177]*Id.* at 535.
[178]*Id.*
[179]*Riner*, 131 F.3d at 536.
[180]*Id.* at 537-39.
[181]*Id.* at 538.
[182]*Id.* at 540.
[271]Franklin v. Beiser, No. 05-96-00485-CV, 1998 WL 2855, at *3 (Tex. App. Jan. 7, 1998) (citing TEX. R. CIV. P. 166a(f)).
[184]*Id.* at *3.

Plaintiff sued defendants for negligence in failing to diagnose and properly treat her breast cancer, and for misrepresentation in denying she had cancer.[185] Plaintiff complained of a lump in her left breast to defendant, who then ordered a mammogram.[186] The mammogram showed no malignancy.[187] Three years later, defendant examined plaintiff again and ordered another mammogram, after which defendant informed plaintiff of the possibility of malignancy.[188] Defendant scheduled an appointment for plaintiff with a defendant surgeon, but plaintiff never followed up after the first visit.[189] A year later plaintiff had a biopsy done by another physician.[190] A cancerous mass was found, and plaintiff underwent surgery.[191]

In her action against defendants, plaintiff failed to attach the necessary medical records to the affidavits in her complaint as required by Rule 166a(f) of the *Texas Rules of Civil Procedure*.[192] Plaintiff argued she should have been granted leave to amend her affidavits by including the necessary medical records,[193] but the court found the trial court acted within its discretion in denying her leave to amend the defective affidavits.[194] The court held the record failed to indicate plaintiff had requested a continuance to file amended affidavits at the summary judgment hearing.[195] Lacking those records, the trial court could not determine the basis of the consultant physician's opinions.[196] The court held the absence of records rendered the affidavits conclusory and was, therefore, a defect of substance, not form.[197] Thus, the grant of summary judgment in favor of defendants was upheld.[198] *Franklin v. Beiser, No. 05-96-00485-CV, 1998 WL 2855 (Tex. App. Jan. 7, 1998).*

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[185] *Id.* at *1.
[186] *Id.*
[187] *Id.*
[188] *Franklin*, 1998 WL 2855, at *1.
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.* at *3.
[193] *Franklin*, 1998 WL 2855, at *4.
[194] *Id.* at *4.
[195] *Id.* at *3.
[196] *Id.* at *4.
[197] *Id.* at *5.
[198] *Franklin*, 1998 WL 2855, at *4.

Standard of Care Requires Physician in Training to Follow Teaching Physician's Instructions

The Court of Appeal of Louisiana for the Third Circuit promulgated the standard of care applicable to a physician training in a fellowship program.[199] The court held the trainee physician was required to follow the instruction of the teaching physician and, while under his direct control and supervision, to perform those tasks directed by the teaching physician.[200] The court also held the standard mandated the trainee to question improper procedures.[201] Once that duty was discharged, the full responsibility for the procedure rested with the teaching physician.[202]

Plaintiff patient sought recovery of claimed damages caused by the negligent placement of metal plates during back surgery.[203] In 1987, plaintiff injured his back and subsequently underwent unsuccessful back surgery.[204] In late 1990, at the suggestion of defendant physician, plaintiff underwent unsuccessful lumbar fusion surgery, which fused the vertebrae in the lower portion of the spine, to alleviate pain.[205] The surgery required the insertion of metal plates into the spine to stabilize the fusion.[206] Expert testimony established placement and alignment of the screws fastening the metal plates was crucial to the success of the procedure.[207] Defendant trainee physician assisted in the insertion of the screws.[208]

Following surgery, plaintiff reported his pain was not alleviated.[209] Additional testing showed a screw on the right side of the spine was improperly aligned.[210] Defendant performed a second surgery on plaintiff to remove the improperly aligned screw and plate.[211] Following surgery,

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[199]Hebert v. LaRocca, 704 So. 2d 331, 337 (La. Ct. App. 1997).
[200]*Id.*
[201]*Id.* at 338.
[202]*Id.* at 337.
[203]*Id.* at 332.
[204]*Hebert*, 704 So. 2d at 332.
[205]*Id.*
[206]*Id.*
[207]*Id.*
[208]*Id.*
[209]*Hebert*, 704 So. 2d at 334.
[210]*Id.*
[211]*Id.*

plaintiff reported his back pain had subsided greatly.[212] Placement of the screw on the right side was the only issue at trial.[213] The trial court held defendant did not breach the standard of care applicable to him as a trainee in placement of the screw on the right side.[214] Plaintiff appealed.[215]

The court first addressed the standard of care applicable to a physician in training in a fellowship.[216] The court, guided by uncontroverted expert testimony, held a trainee had a duty to follow the instructions of a teaching physician.[217] The court further held a trainee was required to perform those duties assigned by the teaching physician, while under the direct control of the teaching physician.[218] The court, however, noted the standard did not extinguish the trainee's obligation to question or report improper procedures to the teaching physician.[219] Proper questioning, the court held, discharged the fellow's duty, and placed full responsibility on the teaching physician regarding the questioned procedure.[220]

The court next addressed whether defendant breached the standard of care.[221] The court held no evidence existed of any situation that required defendant to notify the teaching physician.[222] Accordingly, the judgment of the trial court was affirmed.[223] *Hebert v. LaRocca, 704 So. 2d 331 (La. Ct. App. 1997).*

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[212] *Id.*
[213] *Id.*
[214] *Hebert*, 704 So. 2d at 334.
[215] *Id.* at 335.
[216] *Id.* at 337.
[217] *Id.*
[218] *Id.*
[219] *Hebert*, 704 So. 2d at 336-37.
[220] *Id.* at 337.
[221] *Id.* at 338.
[222] *Id.*
[223] *Id.* at 339.

MENTAL HEALTH

Patient Denied Due Process When Held Without Probable Cause Hearing More Than Seven Days After Initial Detention

The Court of Civil Appeals of Alabama held a prior petition was not required to commit patient to mental hospital,[224] but holding a patient for more than seven days after initial detention was a denial of patient's due process.[225]

Plaintiff's sister petitioned for plaintiff's involuntary commitment.[226] The probate court committed plaintiff to the custody of the State Department of Mental Health, and plaintiff appealed.[227] First, plaintiff argued the probate court was required to find a real and present threat evidenced by an overt act in order to commit him involuntarily.[228] The court held commitment proceedings must meet the requirements of the Alabama Act (Act),[229] which did not require proof of an overt act.[230] Therefore, the probate court did not err in not requiring an overt act for involuntary commitment.[231]

Second, plaintiff argued his due process rights were denied, because he was involuntarily committed to the hospital without a prior petition and judicial determination under the Act.[232] However, the court held the section of the Act setting forth those requirements was inapplicable to patient's situation, because probable cause existed as to whether plaintiff was likely to hurt himself, if he was not involuntarily committed immediately.[233] Patient also argued he was denied due process because the probate court failed to hold a timely preliminary hearing.[234] Pursuant to the applicable provision of the Act, the court held the probate court was required to hold a probable cause hearing to justify continued detention

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[224]Garrett v. Alabama, 707 So. 2d 273, 274 (Ala. Civ. App. 1997).
[225]*Id.*
[226]*Id.*
[227]*Id.*
[228]*Id*
[229]*Garrett,* 707 So. 2d at 274-75 (citing ALA. CODE 22-52-10.4(a)) (1975).
[230]*Id.*
[231]*Id.*
[232]*Id.* at 274 (citing 1975 Ala. Acts 353).
[233]*Id.* at 275 (citing ALA. CODE 22-52-10.4(a) (1975)).
[234]*Garret,* 707 So. 2d at 275.

within seven days of the initial detention of plaintiff.[235] Because the hearing was held more than seven days after plaintiff's initial detention, the plaintiff was denied due process.[236] *Garrett v. Alabama, 707 So. 2d 273 (Ala. Civ. App. 1997).*

NEGLIGENCE

Lack of Monitoring Not Sufficient to Establish Nursing Negligence Without Casual Proof

The Court of Appeals of Louisiana for the Fourth Circuit reversed a trial court's finding of causation between a nursing staff's negligence and patient's death.[237] The court also stated the trial court did not err in upholding the fact finder's conclusion when two treatments for patient's condition were widely recognized.[238]

Patient was diagnosed with sickle cell anemia six months after birth.[239] At age twenty-three, patient was taken to the emergency room of defendant hospital complaining of shortness of breath and chest pain.[240] Patient was admitted with a diagnosis of multiple pulmonary infractions in both lungs.[241] Defendant physician recommended a transfusion; however, the patient initially refused for fear of contracting the human immunodeficiency virus (HIV).[242] The following day, the patient agreed to the transfusion.[243] Twelve hours after receiving the transfusion, the patient suffered a cardiopulmonary arrest and died within two weeks.[244] Plaintiff, patient's mother, subsequently filed suit.[245]

The trial court held defendant physician was not liable, although defendant hospital was found at fault for "nursing negligence."[246] The trial

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[235] *Id.*
[236] *Id.*
[237] Webb v. Tulane Medical Ctr. Hosp., 700 So. 2d 1141, 1149 (La. Ct. App. 1997).
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.* at 1142.
[242] *Webb*, 700 So. 2d at 1142.
[243] *Id.*
[244] *Id.* at 1143.
[245] *Id.*
[246] *Id.*

court's finding was based upon testimony showing the nursing staff had inadequately monitored patient between the time of the transfusion and the cardiopulmonary arrest.[247] Defendant hospital appealed.[248]

The first issue before the court was whether a causal connection existed between the nurse's failure to monitor and patient's respiratory arrest.[249] The court reversed the trial court's finding of causation, agreeing with defendant hospital's expert witnesses that no amount of monitoring could have prevented the arrest.[250] The court then considered plaintiff's appeal of the trial court's dismissal of the claim against defendant physician.[251] Plaintiff argued defendant physician's diagnosis of pulmonary infarct, rather than acute chest syndrome, resulted in a simple transfusion rather than a partial exchange transfusion.[252] However, the court agreed with the trial court's finding that a simple transfusion was an acceptable treatment for either pulmonary infarct or acute chest syndrome, and plaintiff's claim against defendant physician was properly dismissed.[253] *Webb v. Tulane Med. Ctr. Hosp., 700 So. 2d 1141 (La. Ct. App. 1997).*

ORGAN DONATION

Medical Examiner Not Protected By Immunity Where Express Denial of Permission to Remove Organ Tissues

The Court of Appeals of Texas held neither statutory, nor official, immunity protected a medical examiner, who removed the corneas during an autopsy, after the deceased's father expressly denied consent to the removal of the tissues.[254]

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[247] *Webb*, 700 So. 2d at 1143.
[248] *Id.* at 1142.
[249] *Id.* at 1144.
[250] *Id.* at 1145.
[251] *Id.*
[252] *Webb*, 700 So. 2d at 1145.
[253] *Id.* at 1149.
[254] Korndorffer v. Baker, No. 01-96-00062-CV, 1997 WL 797601, at *5 (Tex. App. Houston [1st. Dist.]Dec. 18, 1997).

A gunshot wound inflicted during an altercation with the police killed the decedent.[255] Texas law required an autopsy to be performed.[256] Texas law also permitted the medical examiner to remove and donate the corneas without family consent in certain situations.[257] The plaintiff, decedent's father, called the medical examiner's office and spoke with one of the part-time investigators regarding the autopsy.[258] Plaintiff expressly objected to the removal of any body parts or tissues.[259] However, the investigator stated plaintiff did not object to the removal of the corneas.[260] Thus, the corneas were removed from the decedent's eyes later that evening.[261] Plaintiff sued defendant medical examiner for negligence and negligence *per se* for allowing the removal of the corneas.[262] Defendant moved for summary judgment, but the trial court denied the motion.[263] Defendant then appealed the trial court's decision.[264]

Defendant first argued immunity from liability under the Texas Health & Safety Code.[265] Defendant claimed he "determined the removal of the decedent's corneal tissue would not interfere with subsequent investigations or autopsy, would not alter the decedent's post-mortem facial appearance, and that he was aware of no objections to the removal of the decedent's corneal tissue."[266] However, plaintiff presented evidence he instructed the medical examiner's assistant not to perform anything but the standard autopsy.[267] The court held plaintiff presented sufficient evidence to support his claim he had not consented to the removal of the corneas, and thus, denied summary judgment.[268] The court also held defendant should have known prior to the removal of the corneas that plaintiff had objected.[269]

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[255] *Id.* at *1.
[256] *Id.*
[257] *Id.*
[258] *Id.*
[259] *Korndorffer,* 1997 WL 797601, at *1.
[260] *Id.*
[261] *Id.*
[262] *Id.*
[263] *Id.*
[264] *Id.* at *2.
[265] *Korndorffer,* 1997 WL 797601, at *2 (citing TEX. HEALTH & SAFETY CODE ANN. 693.012).
[266] *Id.* at *3.
[267] *Id.*
[268] *Id.* at *4.
[269] *Id.*

Defendant also raised the defense of official immunity arguing "government employees are entitled to official immunity from suits arising from the performance of their discretionary duties, performed in good faith, as long as they are acting within the scope of their authority."[270] The court held defendant lacked discretionary duty in removing the corneas.[271] Once the father objected to the removal of the corneas, defendant could not lawfully remove the corneas.[272] Therefore, defendant lacked qualified immunity; thus the court denied defendant's motion for summary judgment.[273] *Korndorffer v. Baker, No. 01-96-00062-CV, 1997 WL 797601 (Tex. App. Houston [1st Dist.] Dec. 18, 1997).*

REIMBURSEMENT

Reimbursement Denied For Unauthorized Medical Treatment of Veteran

The United States Court of Veterans Appeals affirmed the Board of Veterans Appeals' decision denying reimbursement costs for the unauthorized private hospitalization and nursing home care for plaintiff's husband.[274]

Plaintiff's veteran husband received unauthorized private hospital care on numerous occasions before his death.[275] After his death, plaintiff filed a claim for reimbursement of his medical expenses.[276] Plaintiff's reimbursement claim was denied because her husband's medical care had not been previously authorized, and the criteria for reimbursement for unauthorized care had not been met pursuant to the applicable statute.[277]

The court held plaintiff was not entitled to reimbursement.[278] The court noted non-veteran facilities were authorized to provide hospital care or medical services when military facilities were not capable of providing

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[270]*Korndorffer,* 1997 WL 797601, at *5.
[271]*Id.* at *5.
[272]*Id.* at *4.
[273]*Id.* at *5.
[387]Malone v. Gober, 10 Vet. App. 539, 544 (Vet. App. 1997).
[275]*Id.* at 540.
[276]*Id.*
[277]*Id.* (citing 38 U.S.C. 1703(a)(1991 & Supp. 1997)).
[278]*Id.* at 540.

similar services.[279] However, neither the statute nor the regulations provided for reimbursement to veterans who paid for such authorized services themselves.[280] Furthermore, plaintiff's husband was not eligible for contracted hospital services at a non-veteran facility under the statute, because he was not treated at a veteran's hospital for service connected injuries.[281] Moreover, the plaintiff did not meet the reimbursement requirements under the statute.[282] The Court also noted, if its decision resulted in a gap in the statutory scheme, the gap should be filled by the legislature rather than by the courts.[283] *Malone v. Gober, 10 Vet. App. 539 (Vet. App. 1997).*

REPRODUCTIVE ISSUES

Quasi-Public Hospital's Anti-Abortion Policy Violated State Constitution

The Supreme Court of Alaska affirmed a lower court's summary judgment and permanent injunction against hospital.[284] The court held the quasi-public hospital's ban on elective abortions violated the state constitutional right to privacy.[285] Further, the court held a state statute declaring hospitals did not have to participate in abortion was unconstitutional as applied to quasi-public institutions.[286]

A non-profit, non-religiously affiliated membership corporation organized for the public interest owned the hospital.[287] The hospital was the only facility in the Matanuska-Susitna (Mat-Su) Valley, and the hospital received state funds for expansion.[288] In 1992, the Hospital Operating Board enacted a new policy prohibiting elective abortions unless:

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[279]*Malone*, 10 Vet. App. at 540 (citing 38 U.S.C. 7 (1991 & Supp. 1997)).
[280]*Id.*
[281]*Id.* at 544 (citing 38 U.S.C. 1703 (1991 & Supp. 1997)).
[282]*Id.* at 546 (citing 38 U.S.C. 1728 (1991 & Supp. 1997)).
[283]*Id.* at 547.
[397]Valley Hosp. Assn. v. Mat-Su Coalition for Choice, 948 P.2d 963, 965 (Alaska 1997).
[285]*Id.*
[286]*Id.*
[287]*Id.*
[288]*Id.*

(1) the fetus had a condition incompatible with life,

(2) the mother's life was threatened, or

(3) the pregnancy was the result of rape or incest.[289]

Subsequently, plaintiff, the Mat-Su Coalition for Choice, filed suit against the hospital seeking declaratory and injunctive relief.[290]

The court held the right to abortion was a fundamental right encompassed in the Alaska Constitution, and the right could only be constrained by a compelling state interest using the least restrictive means.[291] The court deemed the hospital a quasi-public institution because the hospital was the only facility serving the community, and the hospital received government funds for construction, land, and operating costs.[292] The hospital did not demonstrate a compelling state interest for refusing elective abortions and thus, was subject to state constitutional constraints providing for abortion rights.[293]

The court also examined an Alaska statute which stated hospitals could refuse to offer abortions for moral reasons.[294] The court found the statute unconstitutional as applied to quasi-public institutions because the statute provided a basis for the hospital to deny the express privacy right to abortion under the state constitution.[295] Therefore, the court affirmed the lower court's summary judgment and permanent injunction against the hospital.[296] *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice, 948 P.2d 963 (Alaska 1997).*

STATUTE OF LIMITATIONS

Statute of Limitations Runs When Patient Should Have Been Aware of Misdiagnosis

[289] *Valley Hosp. Assn.*, 948 P.2d at 965.
[290] *Id.*
[291] *Id.* at 969.
[292] *Id.* at 970.
[293] *Id.* at 971.
[294] *Valley Hosp. Assn.*, 948 P.2d at 971-72.
[295] *Id.* at 972.
[296] *Id.* at 973.

The Court of Appeal of Louisiana for the Third Circuit affirmed a trial court's ruling that plaintiff had sufficient facts and knowledge for prescription, that is, the statute of limitations, to apply.[297] The court held Louisiana law did not require patients to be informed by attorneys that a medical malpractice action existed before prescription could run.[298]

In April 1992, defendant physician diagnosed a lump in plaintiff patient's breast at the edge of her breast implant.[299] When plaintiff informed her obstetrician/gynecologist (OB/GYN) of the lump in August 1992, her OB/GYN ordered an immediate biopsy, which showed the lump was malignant.[300] Although plaintiff underwent surgery for the malignancy in September 1992, she did not file her request for the convening of a medical review panel until April 29, 1994.[301] At the hearing on defendant physician's exception of prescription, held February 24, 1997, plaintiff admitted she considered filing a complaint against defendant as early as September 1992.[302] Plaintiff's explained she did not file the suit because she did not realize she had a case until January 1994, when she received a brochure from New York attorneys involved in breast implant litigation.[303]

In evaluating whether plaintiff had knowledge of possible malpractice, the court held each case must be decided on its own facts.[304] Plaintiff's educational background, intelligence, and past experience with medical procedures could be introduced.[305] The court further held the law did not require a patient be informed, by either an attorney or a physician, of possible malpractice before prescription could apply.[306] Generally, the court held, the party urging prescription had the burden of proof, unless prescription was evident from the face of the pleadings.[307] In that case,

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[410]Parker v. Dr. X, 704 So. 2d 373, 376 (La. Ct. App. 1997).
[298]*Id.*
[299]*Id.* at 374.
[300]*Id.*
[301]*Id.*
[302]*Parker*, 704 So. 2d at 376.
[303]*Id.*
[304]*Id.* at 375.
[305]*Id.* (citing Lambert v. Metrailer, 485 So. 2d 69 (La. Ct. App. 1986)).
[306]*Id.* (citing Harlan v. Roberts, 565 So. 2d 482, 486 (La. Ct. App. 1990)).
[307]*Parker*, 704 So. 2d at 375.

plaintiff would have the burden of showing an action had not been prescribed.[308]

Finding the pleadings facially prescribed plaintiff's case, the court held the burden of proof fell on plaintiff to establish the action had not prescribed.[309] The court held plaintiff was either aware or should have been aware of the facts upon which her action was based at the time of her surgery.[310] Furthermore, the court held plaintiff's contemplation of a lawsuit in September 1992 indicated she had sufficient facts and knowledge for prescription to apply.[311] *Parker v. Dr. X, 704 So. 2d 373 (La. Ct. App. 1997).*

Medical Malpractice Action for a Minor To Be Filed Within Two Years After Eighteenth Birthday

The Court of Appeals for the Western District of Missouri affirmed a trial court's dismissal of a medical malpractice action against a physician and hospital, because the plaintiff filed his claim more than two years after his eighteenth birthday.[312]

Plaintiff patient sued defendant hospital and physician alleging medical malpractice.[313] Plaintiff had injured his left leg in a bicycle-automobile accident when he was twelve years old.[314] After the accident, defendant treated plaintiff, but failed to order radiographs of plaintiff's left femoral head or hip.[315] Accordingly, defendant failed to diagnose serious damage in that area of plaintiff's body leading to permanent impairment of plaintiff's left hip, requiring early hip replacement.[316] Plaintiff sued defendant physician and defendant hospital alleging medical malpractice.[317]

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[308] *Id.*
[309] *Id.*
[310] *Id.*
[311] *Id.*
[312] Hodges v. Southeast Mo. Hosp. Ass'n, 963 S.W.2d 354, 355 (Mo. Ct. App. 1998).
[313] *Id.*
[314] *Id.*
[315] *Id.*
[316] *Id.*
[317] *Hodges,* 963 S.W.2d at 355.

Plaintiff voluntarily agreed to dismissal of the action, but then refiled when he was twenty-one years old.[318] The trial court held the statute of limitations barred plaintiff's claim and accordingly, dismissed it.[319] Plaintiff appealed arguing the trial court erred in its application of the applicable Missouri statute.[320] Plaintiff contended the statute in question, which established the statute of limitations in medical malpractice actions, unconstitutionally denied minors access to the courts.[321] Plaintiff further argued *Strahler v. St. Lukes Hospital*[322] permitted a plaintiff to file an action in medical malpractice after age twenty-one, if the negligent act occurred when the plaintiff was a minor.[323]

The court distinguished *Strahler* from the instant case by noting the *Strahler* decision invalidated statutory language giving minors negligently injured under the age of ten standing to sue until age twelve.[324] By removing the exception for minors under the age of ten, the *Strahler* decision left no language in the statute indicating minors were to be treated differently with regard to the statute of limitations than adults.[325] The court affirmed the dismissal of plaintiff's action.[326] *Hodges v. Southeast Mo. Hosp. Assn., 963 S.W.2d 354 (Mo. Ct. App. 1998).*

Liability Claim for AIDS Accrued When Plaintiff Learned of HIV-Positive Status

The Court of Appeals of Michigan affirmed summary judgment in favor of defendant, a blood factor concentrate manufacturer, and held the statute of limitations for plaintiff's claim had expired.[327] The court determined plaintiff's claim accrued when plaintiff learned he had contracted the

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[318]*Id.*

[319]*Id.*

[320]*Id.* at 356 (citing MO. REV. STAT. § 516.05 (1994)).

[321]*Id.*

[322]*Hodges,* 963 S.W.2d at 355 (citing Strahler v. St. Lukes Hosp., 706 S.W.2d 7 (Mo banc 1986)).

[323]*Id.* at 356 (citing Strahler v. St. Lukes Hosp., 706 S.W.2d 7 (Mo. 1986) (en banc).

[324]*Id.* at 358.

[325]*Id.*

[326]*Hodges,* 963 S.W.2d at 360.

[327]Berrios v. Miles, Inc., 574 N.W.2d 677, 677 (Mich. Ct. App. 1997).

human immunodeficiency virus (HIV), not when plaintiff began to exhibit symptoms of acquired immunodeficiency syndrome (AIDS).[328]

Plaintiff was given a blood concentrate product manufactured by defendant.[329] In 1985, plaintiff, age at fourteen, was informed he had contracted HIV, and defendant's product was the likely source of the infection.[330] Plaintiff began to experience symptoms of AIDS in 1992, but did not file a lawsuit until 1994.[331]

The court first looked at the time of plaintiff's injury.[332] Injury was determined to be at the point plaintiff discovered he was HIV-positive, which was the earliest point plaintiff was made aware of a potential cause of action.[333] The court dismissed plaintiff's contention his damages were speculative at the time he discovered he was HIV-positive, since as early as 1987, there was general awareness that all individuals infected with HIV would eventually develop AIDS.[334]

The court then examined the applicable statute of limitations to determine the time frame in which plaintiff was able to file suit.[335] The limitations period for products liability actions was three years and thus, the limitations had expired in 1988.[336] Because plaintiff was a minor at the time the claim accrued, he would have been able to file a claim until December 12, 1989, one year after his eighteenth birthday.[337] The court held plaintiff's suit was time-barred because he did not file suit until 1994.[338] *Berrios v. Miles, 574 N.W.2d 677 (Mich. Ct. App. 1997).*

Mentally Incompetent Minor Subject to Tolling Provision for Legal Disabilities Other than Minority

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[328] *Id.*
[329] *Id.*
[330] *Id.*
[331] *Id.*
[332] *Berrios,* 574 N.W.2d at 678.
[333] *Id.*
[334] *Id.*
[335] *Id.*
[336] *Id.*
[337] *Berrios,* 574 N.W.2d at 679.
[338] *Id.*

The Supreme Court of Illinois affirmed the lower court's judgment remanding a negligence claim to the trial court.[339] The court held because plaintiff was suffering from the dual legal disabilities of mental incompetency and minority, he was subject to the tolling provision for legal disabilities other than minority, and not the eight-year repose period for minors.[340]

Plaintiff filed a medical malpractice action against defendant physicians and hospital seeking damages for permanent injuries sustained at birth.[341] Defendants moved to dismiss the action, because the suit was filed more than sixteen years after the alleged malpractice occurred and thus, barred by the eight-year statute of repose for minors.[342]

The court examined at the section of the Code of Civil Procedure applicable to plaintiff's claims of medical malpractice.[343] The court found the plain language of the statute, which indicated the tolling provision allowed for the statute of limitations to run until the disability was removed, included minors who suffered from additional legal disabilities.[344] The court noted mental incompetents were favored persons in the eyes of the law, and courts have a special duty to protect their rights.[345] The court dismissed defendants' argument the appropriate statute of limitations was the eight-year repose period on all claims brought by minors, regardless of whether the minor suffered from another legal disability.[346] Therefore, plaintiff's suit was not time-barred.[347] *Bruso v. Alexian Brothers Hosp., 687 N.E.2d 1014 (Ill. 1997).*

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[339]Bruso v. Alexian Brothers Hosp., 687 N.E.2d 1014, 1020 (Ill. 1997).

[340]*Id.*

[341]*Id.* at 1015.

[342]*Id.*

[343]*Id.* at 1015-16 (citing 735 ILL. COMP. STAT. 5/13-212(b), (c) (West 1994)).

[344]*Bruso*, 687 N.E.2d at 1016-17 (citing 735 ILL. COMP. STAT. 5/13-212(b), (c) (West 1994)).

[345]*Id.* at 1017.

[346]*Id.* at 1020.

[347]*Id.* at 1020-21.

TORTS

Feres Doctrine Applied to Bar Medical Malpractice Suit

The United States Court of Appeals for the Seventh Circuit affirmed the district court's decision applying the Feres doctrine to bar plaintiff's claim against the United States.[348] The court held the Feres doctrine applied to medical malpractice suits arising from military injuries.[349]

After breaking her hand while on active duty with the Indiana National Guard, plaintiff brought a claim for medical malpractice.[350] Plaintiff alleged her injuries were aggravated from the negligent medical care she received at the military hospital.[351] Plaintiff's hand had to be reset on several occasions, and she was eventually required to undergo surgery to correct a nonunion of the original fracture site.[352] The Department of Veteran Affairs denied the claim and plaintiff appealed.[353] The district court held her suit was jurisdictionally barred by the Feres doctrine.[354] According to the Feres doctrine, the Federal Tort Claims Act[355] protects government immunity for injuries arising out of activities relating to injured individual's military service.[356]

The issue before the appellate court was whether plaintiff's injuries arose out of or occurred during the course of her military service.[357] The appellate court held plaintiff's suit was barred because the original injury occurred while she was on active duty and because plaintiff was involved in a continuing course of treatment for her injury at the military hospital.[358] Therefore, the appellate court followed prior Supreme Court cases applying the Feres doctrine to bar suits for medical malpractice arising out

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[348]Selbe v. United States, 130 F.3d 1265, 1268 (7th Cir. 1997).
[349]*Id.*
[350]*Id.* at 1266.
[351]*Id.*
[352]*Id.*
[353]*Selbe*, 130 F.3d at 1268.
[354]*Id.*
[355]*Id.* at 1265 (citing 28 U.S.C. 1346(6) and 2675).
[356]*Id.* at 1265 (citing Feres v. United States, 340 U.S. 135 (1950)).
[357]*Id.*
[358]*Selbe*, 130 F.3d at 1265.

of military injuries.[359] *Selbe v. United States, 130 F.3d 1265 (7th Cir. 1997).*

Plaintiff Required to Present Expert Testimony Regarding Standard of Care Despite Intentional Tort Claim

The Court of Appeals of Idaho held plaintiff bringing action for damages against defendant physician for injury or death could not avoid the requirement of establishing through expert testimony the physician's failure to meet the standard of care by claiming an action based upon an intentional tort.[360]

Plaintiff's wife entered the hospital with chronic obstructive pulmonary disease, and died five days later.[361] Plaintiff alleged his wife's physicians breached their duty by withholding life support.[362] Defendants moved for summary judgment.[363] Plaintiff responded to their motion, but only submitted affidavits from himself and his daughter, an emergency medical technician.[364] After hearing arguments, the district court held plaintiff bore the burden of establishing by expert testimony the defendant's breach of the standard of care.[365] Finding plaintiff failed to establish a breach of standard of care, the court granted the motion for summary judgment in favor of defendants.[366]

On appeal, plaintiff argued because he based his cause of action on intentional infliction of emotional distress, rather than negligence; he was not required to establish a breach of standard of care.[367] Defendants argued plaintiff's pleadings contained language consistent with an action based in negligence.[368] The court agreed, holding plaintiff was required to present expert testimony regarding the applicable standard of care.[369]

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[359]*Id.*
[359]Litz v. Robinson, 955 P.2d 113, 116 (Idaho Ct. App. 1997).
[361]*Id.* at 113-14.
[362]*Id.* at 114.
[363]*Id.*
[364]*Id.*
[365]*Litz*, 955 P.2d at 114.
[366]*Id.*
[367]*Id.*
[368]*Id.*
[369]*Id.* at 115.

As plaintiff had failed to offer expert testimony, the court upheld the grant of summary judgment in favor of defendants.[370] *Litz v. Robinson, 955 P.2d 113 (Idaho Ct. App. 1997).*

WORKERS COMPENSATION

Causal Connection Between Plaintiffs Depression and Work-Related Accident Entitles Her to Workers Compensation

The Court of Appeals of Virginia affirmed the Workers Compensation Commission's decision to award partial disability benefits to claimant until claimant no longer suffered from a work-related injury or condition.[371]

Claimant suffered a work-related back injury, and returned to work three months later.[372] Upon her return, claimant had a dispute with her supervisor about the amount of time she would be able to work.[373] Claimant subsequently became severely depressed and was eventually admitted to a psychiatric facility.[374] Claimant eventually returned to work but was only able to work reduced hours because of her depression.[375] The Workers Compensation Commission awarded partial disability benefits and employer appealed.[376]

The issue on appeal was whether credible evidence supported the award of partial disability benefits.[377] Relying on the commission's finding that claimant's depression was causally related to her work related injury, the court held claimant was entitled to partial disability benefits until claimant no longer suffered from a job-related injury or condition.[378] *Mary Washington Hosp. v. Harrison, 493 S.E.2d 693 (Va. Ct. App. 1997).*

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[370] *Litz*, 955 P.2d at 116.
[371] Mary Washington Hosp. v. Harrison, 493 S.E.2d 693, 694 (Va. Ct. App. 1997).
[372] *Id.*
[373] *Id.*
[374] *Id.* at 694-95.
[375] *Id.* at 695.
[376] *Mary Washington Hosp.*, 493 S.E.2d at 695.
[377] *Id.*
[378] *Id.* at 696.